STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

By Edwin M. Borchard,

Assistant Solicitor, Department of State, Washington, D. C.

We hear occasionally of cases in which a person proves his complete innocence of a crime for which he had previously been convicted and imprisoned. These accidents in the administration of the criminal law happen either through an unfortunate concurrence of circumstances, or from perjured testimony, or are cases of mistaken identity, the conviction having been obtained usually on circumstantial evidence.

A few recent cases will serve as illustrations. A person named Toth was convicted of murder in Pennsylvania and sentenced to life imprisonment, in spite of his continued protestations of innocence. After having served twenty years of his sentence his innocence was established beyond a doubt. He was released from prison a physical wreck. The law could only give him his liberty; the legislature declined to grant him compensation for the wrong the state had committed, and finally Andrew Carnegie saved him from starvation by paying him a small monthly pension. The famous Beck case in England arose through mistaken identity in conjunction with negligence on the part of the English police and the English courts. Beck served seven years on a serious charge and was then released only because the real offender fell into the hands of the police and the mistake of identity was established. There are numerous cases of this kind. Judge Sello of Germany in a book recently published collects a great number of them from various countries of the world.

The matter with which we are now concerned is to ascertain whether the state, by simply opening the jail door, has completely fulfilled its obligation toward these unfortunate victims of the errors of justice. Let us see what the state has done in these cases. It has taken the man from his daily occupation by mistake, either because circumstances appeared against him, or because he looked like the real criminal, or from some other mistaken reason. The state must of course prosecute those who are suspected of crime; but when the facts subsequently show that it has convicted and imprisoned an

innocent man, does not the state owe that man compensation for the special sacrifice he has been compelled to make in the interest of the community?

Our law begins with the assumption that the state can do no wrong and it is therefore apt to be indifferent when by its own wrong it has injured an individual citizen. With the progress of time, however, the state has come to compensate for many of its wrongs, and the federal government and practically all the states now freely subject themselves to suit at the hands of injured individuals. It was for this purpose that the federal court of claims was established. Again, the state freely admits that, for certain interferences with private rights for the public interest, compensation to the private individual must be made. Thus when his private property is taken for a public use, such as a public building or a road, compensation is made. This is a fundamental idea in our constitutional law and has existed for centuries. Yet when the liberty of an individual is taken for the public use—and the preservation of the public peace through the administration of the criminal law is a public purpose at least equally as vital to social welfare as the erection of public buildings—the right to compensation is apparently overlooked. Why? Dean Wigmore in an editorial on this subject has said:

> Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which *per se* admits that our justice may err. But let us be realists. Let us confess that of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable.

Let us briefly state the two main theories which underlie such compensation. The first is the theory of eminent domain which we have just mentioned, that is, that the owner of private property which is taken for public use shall be duly compensated. In this case private liberty, a right at least equally as sacred as that of property, is taken for the public use. And here we may note a fallacy in a contention which has been advanced against this analogy. This contention is that when property is taken the community is enriched and on a well-known legal principle, the doctrine of unjust enrichment, the state must pay; whereas when liberty is taken the state is not

enriched. The fallacy consists in this fact—that the compensation paid does not represent the benefit secured by the state, but the loss inflicted on the individual. The analogy to eminent domain is therefore apparent.

The other theory is the same as that which supports workmen's compensation, which has now received legislative expression in practically every progressive state and is gaining ground constantly. The principle is this—that in the operation of any great undertaking, such as the management of a large industry or the administration of the criminal law, there are bound to be a number of accidents. In other words, among the thousands that are annually convicted some will be wrongfully convicted through mistake. We have recognized, in certain spheres of activity, that it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.

In moving for this amendment of the criminal law we are guided not solely by our sense of justice, but have, as models, the legislation of practically every country in western Europe. Germany, France, Austria, Portugal, Denmark, Norway, Sweden and Switzerland now have elaborate statutes governing this subject and will in all probability soon be joined by Italy and Holland.[1] Ever since the French Revolution, reformers and criminalists have sought to bring about this amendment of the criminal law, and from 1886 on they have seen their efforts crowned with success in one country after another. Why should we in the United States lag behind any longer? The justice underlying the compensation is apparent. In overcoming practical objections, to which we shall now address ourselves, we again have before us the examples furnished by the countries of Europe.

We must distinguish two classes of injustice of the character under discussion. The first is the detention of an erroneously accused innocent person extending up to his acquittal. An injustice has here been

[1] See Senate Document 974, 62d Cong., 3d sess., "State Indemnity for Errors of Criminal Justice" by Edwin M. Borchard, with an editorial preface by John H. Wigmore. Washington, Government Printing Office, 1912, 33 p.

done undoubtedly, in that the accused has been unjustly detained and put to the trouble and expense of defense against a criminal prosecution. Massachusetts, by an act of June 22, 1911 (ch. 577), authorizes compensation for lost income to acquitted or discharged persons confined in excess of six months while awaiting trial.

Yet the case of unjust detention pending trial is left aside for the present, in order that we may deal with the much more flagrant injustice of a conviction of an innocent person followed by sentence and imprisonment. Where the facts show that the conviction has resulted through no demerit of his own, certainly the state owes the victim compensation for the grievous wrong that he has been compelled to suffer. Most of the European countries provide for indemnification in both cases, that is, detention pending trial which results in acquittal, and the still harsher case of unjust conviction and imprisonment. We propose to deal now with the practical features of compensation in the case of erroneous conviction.

A right to relief of this kind might be abused if it were not strictly limited. We propose therefore so to limit the right to compensation that its benefits could be obtained only in cases of the grossest injustice and most deserving relief. Here again we may learn much from European laws.

It is clear that we can not compensate every acquitted person. In fact under our lax administration of the criminal law and the possibility of technicalities producing injustice, we know that many morally guilty persons are legally acquitted.

We would first, therefore, compel the unjustly convicted person claiming the right to relief to prove that he was innocent of the crime with which he was charged and not guilty of any other offense against the law. And here, he must satisfactorily show one of two things: that the crime, if committed, was not committed by the accused, or that the crime was not committed at all. This at once eliminates from consideration a vast class of possible claimants.

In the second place, the loss indemnified shall be confined to the pecuniary injury, that is, loss of income, costs for defense and for securing his ultimate acquittal or pardon, and similar losses. It is true that the pecuniary injury is in these cases the smallest element of loss; the damage to reputation and the mental suffering are by far the greater injuries. To compensate this moral injury, however, might entail severe burdens on the state treasury and open the way

to speculative claims. For this reason it might be better to exclude from all possibility of claim the moral injury suffered. In any event, we would limit the amount of the relief to $5,000, as the highest sum recoverable.

Again, certain other limitations must be provided for, either specifically, or by being taken into account by the court awarding the compensation. For example, the accused must not by censurable conduct of his own have caused his arrest, prosecution or conviction; thus, the concealment of evidence, the making of a false confession or any similar reprehensible act should operate as a bar to the claim. This follows the well-known maxims that a claimant must come into court with clean hands, and that no one shall profit by his own wrong. As the award of an indemnity is to be discretionary, the court should take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief.

Finally, the action must be brought within a brief period of his release from imprisonment; six months would be a reasonable time to allow.

There may be some difficulty in the matter of procedure, although this can easily be adjusted. We consider the court of claims, or similar state court having jurisdiction of claims against the state, as the forum appropriate for this relief, more so than the trial, appellate, or second trial court, even though these courts could perhaps better judge of the intrinsic merits and circumstances of the case. Moreover, an executive pardon is often based on evidence which has never been submitted to a court. We advocate jurisdiction being given to a court of claims in order to maintain the traditions of American judicial procedure. If the jury or trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries), it would bring into our law a new kind of acquittal in which the jury or judge could acquit with degrees of approval or sympathy, a procedure which might give rise to odious distinctions. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court or by the jury, it is better to forego this advantage for the sake of conformity with legal custom and to leave the establishment of the damage to a court having jurisdiction of other claims against the state.

It may be argued as an objection to such a measure that the case is of rare occurrence. The very fact, however, that there will be few demands on the state treasury should overcome any hesitation there may be to enact appropriate legislation. The mere rarity of the case is no reason for a failure to acknowledge the principle and to remedy the evil. It makes the individual hardship when it does occur seem all the more distressing. Dean Wigmore has explained our previous indifference to the grievous injustice thus inflicted on innocent individuals as follows:

> It is nobody's interest, apparently, to move for such a law. You and I have never suffered in that way; no large business is threatened; no class of persons feel a loss in their pockets; and so nobody exerts himself. Only the casual victims feel the wrong and to expect them to unite in a demand for legislation is absurd.

We have undertaken to draw a bill to regulate this question so far as it applies to convictions of innocent persons in the federal courts. The bill has been introduced in both houses of Congress; it is now before the judiciary committees, and it is hoped will become a law. The bill is here given in full:

A BILL

To grant relief to persons erroneously convicted in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, having been convicted of any crime or offense against the United States, shall hereafter, on appeal from the judgment of conviction or on the retrial or rehearing of his case, be found to have been innocent of the crime with which he was charged and not guilty of any other offense against the United States, or who, after inquiry by the executive, has received a pardon on the ground of innocence, may, under the conditions hereinafter mentioned, apply by petition for indemnification for the pecuniary injury he has sustained through his erroneous conviction and imprisonment.

Sec. 2. That the claimant may, within six months after he has been finally acquitted or pardoned on the ground of innocence, petition the court of claims for the relief granted in this act.

Sec. 3. That the court is hereby authorized to make all needful rules and regulations, consistent with the law, for executing the provisions hereof.

Sec. 4. That the claimant shall have the burden of proving his innocence, in that he must show that the act with which he was charged was not committed at all or, if committed, was not committed by the accused.

Sec. 5. That the claimant must show that he has not, by his acts or fail-

ure to act, either intentionally or by wilful misconduct or negligence, contributed to bring about his arrest and conviction.

Sec. 6. That the court of claims shall examine the validity and amount of all claims included within the description of this act; they shall receive all suitable testimony on oath or affirmation and all other proper evidence; and they shall report all such conclusions of fact and law as in their judgment may affect the right to relief.

Sec. 7. That upon proof satisfactory to the court of claims that the claimant is unable to advance the costs of court and of process, the cost of obtaining and printing the record of the original proceedings and of securing the attendance of such witnesses as the chief justice or the presiding judge of the court of claims shall certify to be necessary, and the service of all notices required by this act, shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a duly authenticated order, certified by the clerk of the court of claims and signed by the chief justice or, in his absence, by the presiding judge of said court.

Sec. 8. That the court shall cause notice of all petitions presented under this act to be served on the attorney-general of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard by the court. He shall resist all claims presented under this act by all proper legal defenses.

Sec. 9. That the court of claims in granting or refusing the relief demanded shall take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief herein provided for, but in no case shall the relief granted exceed five thousand dollars.

Sec. 10. That in all cases of final judgments by the court of claims the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a copy of said judgment, certified by the clerk of the court of claims, and signed by the chief justice or, in his absence, by the presiding judge of said court.

Since the enactment of this legislation was first proposed in this country, in January, 1913, two states of the Union, Wisconsin (Laws of 1913, ch. 189) and California (Laws of 1913, ch. 165), have enacted statutes on the lines of the above bill. The public press has given it more general support than is usually accorded to new proposals for specific improvements in the law. In these times, when social justice is the watchword of legislative reform, it is not an unreasonable expectation that statutes, carrying into effect this desirable reform, will soon be enacted by our federal and state governments, for which Wisconsin and California may be regarded as worthy examples.